

A Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-281
OF 1995

SITI NORMA YAAKOB, MAHADEV SHANKAR AND DENIS ONG JJCA
6 JUNE 1997

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Civil Procedure — Pleadings — Parties bound by — Unfair and unjust to raise other points which no formal notice has been given — Industrial Court considered irrelevant issues not pleaded — Whether doctrine of waiver or condonation applies to employees — Whether appellant could argue cumulative misconduct which was not pleaded

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Labour Law — Employment — Termination of service — Dismissal — Test for constructive dismissal — Wrong test applied by Industrial Court — Employer requested employee to exchange his room with another staff — Whether employer was guilty of a breach going to the root of the contract — Whether employer has evinced an intention no longer to be bound by the contract

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The appellant ('Anwar') was employed by the respondent ('Bayer (M)') in January 1981 as senior executive. Anwar then became Bayer (M)'s personnel and administration manager. He was later allocated duties as a liaison officer in the respondent's factory in Shah Alam.

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In August 1989, the diagnostic section of Bayer (M) took over the operations of its Singapore company ('Bayer (S)') and was upgraded as a business group with Bayer (M). One TS Chee ('Chee') was made business group manager of this group. His staff increased by eight persons. Additional space was required for them and for demonstration of the diagnostic equipment. On 17 October 1989,

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the managing director of Bayer (M) issued a memo to both Chee and Anwar which proposed that Chee and Anwar exchanged their present rooms. A discussion took place on 19 October 1989 in which Anwar asked for clarification of the memo. On 23 October 1989, Anwar wrote a letter to the managing director stating that the memo was a clear indication that the managing director wanted to drive him out

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of his employment and that he considered himself to have been dismissed by the managing director. Anwar claimed that he had been relieved of his administrative functions and he had the impression that the management of the company had wanted to get rid of him. Anwar's claim that he had been constructively dismissed by Bayer (M) was upheld by the Industrial Court. The chairman of the

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Industrial Court took into account previous acts of alleged victimization which were not pleaded but brought out for the first time at the hearing. On appeal, the High Court held that the Industrial Court had applied the wrong test and quashed the decision. Anwar appealed.

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Held, dismissing the appeal:

- (1) The rule that parties should be confined to the issues raised in their pleadings applies equally in the Industrial Court. This rule is based on justice and equity because it is unfair and unjust to

permit a party to raise other points of complaint at the trial of which no formal notice has been given. The Industrial Court in this case made a mistake by permitting Anwar to raise all sorts of other matters which were only calculated to prejudice the fair trial of the case (see p 605B-C).

The chairman had taken into account irrelevant considerations by going into previous acts of alleged victimization which were not pleaded but brought out for the first time at the hearing in the Industrial Court. Contrary to Anwar's statement of claim, there was no evidence whatsoever that he had been 'relieved of his administrative functions' on 17 or 19 October 1989. The doctrine of waiver or condonation applies equally to employees. If cumulative misconduct is being urged, it must be pleaded and evidence has to be given to show that each misconduct was so connected with the culminating act of misconduct as to form part of the same transaction. However, that was not pleaded here (see p 607D-F).

- (2) The proper approach in deciding whether constructive dismissal has taken place is not to ask whether the employer's conduct was unfair or unreasonable (the unreasonableness test) but whether 'the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or whether he has evinced an intention no longer to be bound by the contract'.

In the High Court, the judge found that the chairman had applied the wrong test. The factual issue was whether Bayer (M)'s proposal that Anwar's move to Chee's room was made with a view to finding a solution to problems of space or whether it was done to evince an intention no longer to be bound by the contract. There was no finding here that the alleged breach was a fundamental breach so as to go to the root of the contract. At its very highest, it was only Anwar's impression that Bayer (M) wanted to get him out. The chairman of the Industrial Court had completely failed to deal with the actual evidence of what transpired. He had asked himself the wrong questions and applied the wrong test (see pp 605I, 606A-C and 607B-C).

[Bahasa Malaysia summary]

Perayu ('Anwar') digaji oleh penentang ('Bayer (M)') pada bulan Januari 1981 sebagai eksekutif kanan. Anwar kemudiannya menjadi pengurus bahagian kakitangan dan pentadbiran Bayer (M). Dia kemudiannya telah diperuntukkan tugas sebagai pegawai perhubungan di kilang penentang di Shah Alam.

Pada bulan Ogos 1989, bahagian diagnostik Bayer (M) telah mengambil alih operasi syarikatnya di Singapura ('Bayer (S)') dan dinaikkan taraf sebagai kumpulan perniagaan dengan Bayer (M). Seorang bernama TS Chee ('Chee') telah dilantik sebagai pengurus bahagian perniagaan kumpulan ini. Kakitangan telah bertambah

- A seramai lapan orang. Ruang tambahan dikehendaki untuk mereka dan untuk pameran kelengkapan diagnostik. Pada 17 Oktober 1989, pengarah urusan Bayer (M) mengeluarkan satu memo kepada kedua-dua Chee dan Anwar yang mencadangkan supaya Chee dan Anwar saling menukar bilik mereka sekarang. Perbincangan telah berlaku
- B pada 19 Oktober 1989 di mana Anwar meminta penjelasan mengenai memo tersebut. Pada 23 Oktober 1989, Anwar telah menulis sepucuk surat kepada pengarah urusan menyatakan bahawa memo tersebut adalah petunjuk yang jelas bahawa pengarah urusan berniat mengusirnya daripada penggajiannya dan bahawa dia menganggap dirinya telah dipecat oleh pengarah urusan. Anwar menuntut bahawa dia telah dipecat daripada fungsi pentadbirannya dan dia bertanggungjawab bahawa pihak pengurusan syarikat tersebut berniat mengusirnya. Tuntutan Anwar bahawa dia telah dipecat secara konstruktif oleh Bayer (M) disahkan oleh Mahkamah Perusahaan. Pengerusi Mahkamah Perusahaan telah mengambil kira tindakan dahulu pemangsaan yang dikatakan yang tidak diplidkan tetapi dibangkitkan buat kali pertama di pembicaraan. Atas rayuan, Mahkamah Tinggi memutuskan bahawa Mahkamah Perusahaan telah memakai ujian yang salah dan membatalkan keputusan. Anwar merayu.
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Diputuskan, menolak rayuan:

- E (1) Rukun bahawa pihak-pihak patut dihadkan kepada isu-isu yang dibangkitkan dalam pliding mereka sama-sama terpakai di Mahkamah Perusahaan. Rukun ini adalah berdasarkan keadilan dan ekuiti kerana ia adalah tidak adil dan tidak saksama untuk membenarkan sesuatu pihak untuk membangkitkan hujah aduan yang lain di pembicaraan di mana tiada notis rasmi telah diberikan.
- F Mahkamah Perusahaan dalam kes ini telah membuat kesilapan dengan membenarkan Anwar membangkitkan pelbagai jenis perkara lain yang hanya dijangka untuk memudaratkan pembicaraan adil kes (lihat ms 605B-C).
- G Pengerusi telah mengambil kira pertimbangan yang tidak relevan dengan membincangkan perbuatan pemangsaan dahulu yang tidak diplidkan tetapi yang dibangkitkan buat kali pertama di pembicaraan di Mahkamah Perusahaan. Bertentangan dengan pernyataan tuntutan Anwar, tiada apa-apa keterangan sama sekali bahawa dia telah 'dipecat daripada fungsi pentadbirannya' pada 17 atau 19 Oktober 1989. Doktrin penepian atau pemaafan sama-sama terpakai kepada pekerja-pekerja. Andainya salah laku kumulatif diujar, ia mesti diplidkan dan keterangan mesti diberikan bagi menunjukkan bahawa setiap salah laku begitu berkait dengan perbuatan salah laku yang berbangkit hinggalah membentuk sebahagian transaksi yang sama. Namun demikian, itu tidak diplidkan di sini (lihat ms 607D-F).
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- I (2) Pendekatan yang betul dalam memutuskan sama ada pemecatan konstruktif telah berlaku bukanlah untuk mempersoal sama ada kelakuan majikan adalah tidak adil atau tidak munasabah (ujian

ketidakmunasabahan) tetapi sama ada 'kelakuan majikan adalah demikian hinggakan majikan bersalah atas kemungkiran yang menjejaskan akar umbi kontrak atau sama ada dia telah memperlihatkan suatu tujuan untuk dibebaskan daripada kontrak'.

Di Mahkamah Tinggi, hakim mendapati bahawa pengerusi telah memakai ujian yang salah. Isu fakta adalah sama ada cadangan Bayer (M) bahawa perpindahan Anwar ke bilik Chee telah dibuat dengan tujuan mencari penyelesaian kepada masalah ruang atau sama ada ia telah dibuat untuk memperlihatkan satu hasrat untuk tidak lagi diikat oleh kontrak. Tiada pendapat di sini bahawa kemungkiran yang dikatakan adalah kemungkiran asas yang menjejaskan akar umbi kontrak. Ia cumalah tanggapan Anwar bahawa Bayer (M) ingin menyingkirnya. Pengerusi Mahkamah Perusahaan langsung telah gagal menguruskan keterangan sebenar mengenai apakah yang berlaku. Beliau telah bertanya diri persoalan yang salah dan memakai ujian yang salah (lihat ms 605I, 606A-C dan 607B-C).]

Notes

For cases on pleadings, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2506-2772.

For cases on termination of service, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 836-868.

Cases referred to

Ho Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369 (refd)

Holiday Inn, Kuching v Elizabeth Lee Chai Siok [1992] 1 CLJ 141 (refd)
Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor [1988] 3 MLJ 204 (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union [1995] 2 MLJ 317 (refd)

Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ 92 (refd)

Appeal from: Originating Motion No R3-25-56 of 1994 (High Court, Seremban)

B Lobo (Lobo & Associates) for the appellant.

TM Varughese (TM Varughese & Co) for the respondent.

Mahadev Shankar JCA (delivering judgment of the court): The appellant ('Anwar') claimed that he had been constructively dismissed by the respondent ('Bayer (M)'). The Industrial Court upheld Anwar's claim. The High Court quashed the award of the Industrial Court. We dismissed Anwar's appeal to us. Our reasons now follow.

Anwar first joined Bayer (M) in December 1975. He resigned on his own accord in June 1980. Subsequently, he rejoined Bayer (M) in January

- A** 1981 as senior executive. From about 2 May 1984, Anwar became Bayer (M)'s personnel and administration manager. Bayer (M) then decided to put up a factory in Shah Alam ('the Shah Alam project'). In 1986, Anwar was allocated duties in connection with the Shah Alam project as a liaison officer. He was sent to Germany for special training in this connection. Upon his return, he continued to be responsible for this project.

- B** In 1989, Bayer (M)'s administrative offices were located on the sixth floor of Pemas International at Jalan Sultan Ismail, Kuala Lumpur. TS Chee ('Chee') was the section manager for the diagnostic division. On 1 June 1989, Mr Herzer joined Bayer (M) as its managing director. Because there were serious space constraints in the Pemas International building,
- C** Bayer (M) relocated its office to the MPSA building in Shah Alam. Ho Toong Seng ('Ho') was the company secretary.

- In August 1989, the diagnostic section of Bayer (M) took over the operations of its Singapore company ('Bayer (S)'). The diagnostic division ('DS') was upgraded as a business group with Bayer (M). Chee was made
- D** business group manager of this diagnostic business group. His staff increased by eight persons. Additional space was required for them and for demonstration of the diagnostic equipment.

On 17 October 1989, Mr Herzer issued a memo countersigned by Ho addressed to both Chee and Anwar. It reads as follows:

- E** Diagnostics division has been upgraded as a business group within Bayer Malaysia. In August, DS also took over the Singapore operations.

Mr Chee's present room (originally meant for section manager) is inadequate for him to function.

- F** We propose that M/s Chee and Anwar exchange their present rooms. To avoid any disruption during normal office hours, we suggest the resitting takes place on Saturday morning, that is 21 October 1989.

Mr Chee's two other staff will also move into the admin area.

- This memo was only a proposal. It was not an order. 17 October 1989 was a Tuesday. Anwar asked for a discussion. This took place on 19 October 1989 (a Thursday) when Anwar asked for clarification of the memo.
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On 23 October 1989 (ie the following Monday), Anwar wrote a letter to the manager. It read as follows:

Dear Sir,

- H** I refer to your memo dated 17 October 1989 and the discussion with you on 19 October 1989 when I sought clarification on the contents of your memo.

In the light of what had transpired since your arrival in the company in June 1989, the contents of your memo is a clear indication that you want to drive me out of my employment for reasons best known to you. I am now convinced of this, in view of your suggestion that the company can pay me severance pay and 'help' me to seek another job through a placement agency.

- I** Under the circumstances, I have no alternative but to consider myself dismissed by you with effect from today.

Anwar handed this letter to Mr Herzer's secretary and walked out.

In his statement of case, Anwar stated:

- 3.1 By a memo dated 17 October 1989, the claimant was asked to 'exchange' rooms with another colleague, one Mr TS Chee. At the same time, the claimant was also relieved of his admin functions. The claimant then sought and had a meeting with the company's managing director who made it clear that the company did not want to continue the employment relationship with the claimant.

In its statement of reply, Bayer (M) said:

- 3 Paragraph 3.1 of the statement of case is a distortion of facts and is denied except that the company did issue a memo dated 17 October 1989 as per copy annexed hereto and marked 'Co-1'. The claimant is put to strict proof as to the contents in para 3.1.
- 4 The company did receive from the claimant 'CL-1' referred to in para 3.2 of the statement of case.

It is manifestly obvious from the above that Anwar confined himself to the events which occurred on 17 and 19 October 1989 to urge his claim.

As to what happened on 19 October 1989, Anwar said this in his evidence-in-chief:

Q: Who is Mr Chee?

A: He is a manager in the diagnostic division.

Q: Where did you sit after that?

A: I was told to go to Mr Chee's room. I did not go to his room. Then I made an appointment to see him and managed to see Mr Herzer on 19 October 1989. I went to see him regarding the memo and expressed my reservation and asked him what his intention was. He told me that Mr Chee needs the room. But I told him if I move out of my room, it would be very embarrassing for me. I asked him whether he does not want me in the company.

Mr Herzer told me that the company may be able to find me another job through a placement agency.

Q: What impression did you get?

A: My impression was that he wanted me out of the company.

Q: What did you do after that?

A: I then went back to my room and contemplated what I should do.

Q: Did you then write the letter CL-1 found in the statement of case?

A: Yes, I did. (Claimant read the letter CL-1.)

Q: Did you get a reply to your letter CL-1?

A: No.

In cross-examination, he said:

Q: What transpired between you and Mr Herzer on 19 October 1989? Tell the court.

A: On that day, I sought an appointment on the verification of the letter dated 17 October 1989. This was on 19 October 1989. I asked him his move would embarrass me and is it his intention to ask me to leave. He said no but Mr Herzer said he could help to get another job.

- A Q: In cross examination, you mentioned that 'my impression was that they really wanted to get me out'. It is only your impression?
- A: It is purely my impression. Mr Herzer did not tell me he wanted to get rid of me.

For the purposes of this appeal, we propose to accept this evidence at face value.

- B The rule that parties should be confined to the issues raised in their pleadings applies equally in the Industrial Court. This rule is based on justice and equity because it is unfair and unjust to permit a party to raise other points of complaint at the trial of which no formal notice has been given.
- C Industrial Court made a serious blunder when it permitted Anwar to raise all sorts of other matters which were only calculated to prejudice the fair trial of this case. It should have confined itself to the issues raised.

Be that as it may, when it came to the crunch, the material part of the chairman's findings in his own words are as follows:

- D The company has the right to reorganize or restructure its business in the way it likes for the purpose of economy or convenience provided that it acts bona fide. However, it is my finding that the company had not acted bona fide in this matter.

- E The reason for his resigning from the company was due to the conduct of the company between 1 June 1989 and 15 October 1989; the taking away of his admin manager's post, taking away of his responsibilities from the warehouse and transport, taking away his car park to give to an expatriate, removing his secretary and his staff, not naming him as personnel and administrative manager in the BG meeting and finally requesting the claimant to exchange his room with TS Chee, who is lower in position to the claimant, showed loss of confidence in the claimant by the company. The treatment accorded to the claimant was certainly not justified. The chain of evidence goes to prove that the exchanging of rooms amounted to demotion and embarrassment to the claimant.
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The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the company which may cumulatively amount to breach of the terms. These repudiatory acts taken cumulatively or individually establish a strong and indefensible case of constructive dismissal by the company.

- G To constitute a breach of implied term, *it is not necessary to show that the employer intended any repudiation of the contract*. The tribunal's function is to look at the employer's conduct as a whole and determine whether its effect, *judged reasonably and sensibly*, is such that the employee cannot be expected to put up with it. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed. Therefore, the company's argument that there was a delay from 3 July 1989 to 23 October 1989 on the part of the claimant and therefore he now cannot raise those issues, does not hold water.
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- I It is the court's view that the company will not, *without reasonable and proper cause*, conduct itself in a manner likely to damage the relationship of confidence and trust between the company and the claimant. (Emphasis added.)

It has been repeatedly held by our courts that the proper approach in deciding whether constructive dismissal has taken place is not to ask

oneself whether the employer's conduct was unfair or unreasonable (the unreasonableness test) but whether 'the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or whether he has evinced an intention no longer to be bound by the contract'. (See *Holiday Inn, Kuching v Elizabeth Lee Chai Siok* [1992] 1 CLJ 141 and *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92 at p 94.)

In the court below, Low Hop Bing J found that the chairman had applied the wrong test. We agree. The factual issue was whether Bayer (M)'s proposal that Anwar's move to Chee's room was made with a view to finding a solution to problems of space or whether it was done to evince an intention no longer to be bound by the contract. If it was a breach to suggest that Anwar could move to Chee's room (and we cannot see in the circumstances how it was), we fail to see how it can be urged that this breach was so fundamental as to go to the root of the contract.

This case comes very close to what happened in *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204 where Abdoolcader SCJ held at p 207:

In the light of the several matters I have discussed and considered against the background of the law in regard to jurisdictional error, the decision of the Industrial Court was clearly perverse and so devoid of plausible justification that no reasonable body of persons could have reached it. The Industrial Court accordingly transcended its jurisdiction in making the award that it did and the privative provisions of s 33B(1) of the Industrial Relations Act would not accordingly preclude the issue of certiorari in the circumstances.

As Gopal Sri Ram JCA said in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union* [1995] 2 MLJ 317 at p 342:

An inferior tribunal or other decision making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law and it is no longer of concern whether the error is jurisdictional or not. Such distinction ought no longer to be maintained. If there is an error of law upon which the award of the tribunal is found, such error whether of interpretation or otherwise must necessarily be without jurisdiction or in excess of jurisdiction. It follows that the decision of the Board in *South East Asia Fire Bricks v Non-Metallic Mineral Products Manufacturers Employees Union & Ors* [1981] AC 363, and all those cases approved by it, are no longer good law. By the same token, the cases of *Kannan v Menteri Buruh dan Tenaga Rakyat* [1974] 1 MLJ 90 and *Lian Yit Engineering Works Sdn Bhd v Loh Ah Fon & Ors* [1974] 2 MLJ 41, though disapproved or overruled by the Board, must now be taken to have always correctly stated the law.

Since an inferior tribunal has no jurisdiction to make an error of law, its decision will not be immunized from judicial review by an ouster clause, however widely drafted. The ouster clause in s 33B(1) of the Act, therefore, does not disable the High Court from exercising its judicial review of awards of the Industrial Court.

It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not

A closed. But an error of law would be disclosed if the decision maker asks himself the wrong questions, or takes into account irrelevant considerations, or omits to take into account relevant consideration, or if he misconstrues the terms of any relevant statute, or misapplies or mis-states a principle of the general law.

B This was applied in *Ho Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 at p 390.

C In the present case, there was no finding that the alleged breach on 17 and 19 October 1989 was a fundamental breach going to the root of the contract. At its very highest, it was only Anwar's impression that Bayer (M) wanted to get him out. Indeed, Anwar's evidence was that he pointedly asked Mr Herzer if it was Mr Herzer's intention to ask him to leave and Mr Herzer said no. The chairman of the Industrial Court completely failed to deal with the actual evidence of what transpired on 19 October 1989. He did not even apply his mind to what Anwar had said.

D We are concerned here with the decision making process. With respect, the chairman asked himself the wrong questions and applied the wrong test.

E He also took into account irrelevant considerations by going into previous acts of alleged victimization which were not pleaded but brought out for the first time at the hearing in the Industrial Court. Contrary to Anwar's statement of claim, there was no evidence whatsoever that he had been 'relieved of his administrative functions' on 17 or 19 October 1989. The doctrine of waiver or condonation applies equally to employees. Therefore, if cumulative misconduct is being urged, it must be pleaded and evidence has to be given to show that each misconduct was so connected with the culminating act of misconduct as to form part of the same transaction. That is not what was pleaded here.

F We, therefore, dismiss this appeal with costs here and below and order the deposit be paid out to the respondent to account of their taxed costs.
Appeal dismissed.

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Reported by David Lai

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